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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 336

LOCAL 254, BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals adjudging petitioner in civil contempt of the court's decree enforcing the Board's unfair labor practice order (Pet. App. 11-18) is reported at 376 F. 2d 131. The court's opinion in the initial enforcement proceeding (R. 123-128; reprinted in the Appendix, *infra*, pp. 14-20)[1] is reported at 359 F. 2d 289. The Board's

[1] "R." refers to the certified record filed in this Court with the petition for certiorari. Included therein are the printed

decision and order which formed the basis for the court proceedings (R. 1-21) are reported at 151 NLRB 341.

JURISDICTION

The judgment of the court of appeals finding petitioner in civil contempt was entered on April 10, 1967 (Pet. App. 18-19). The petition for a writ of certiorari was filed on July 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), Section 8(b) of the Act (29 U.S.C. 158(b)), in pertinent part provides as follows:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> (4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or

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"Joint Record Appendix" used in the original enforcement proceeding, and the transcript of the testimony at the subsequent contempt proceeding.

manufacturer, or to cease doing business with any other person * * *: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * * * * * *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution * * *.

QUESTION PRESENTED

In an earlier proceeding, the court of appeals sustained the Board's finding that the union had violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act by picketing certain neutral employers in order to force them to cease doing business with another employer, with whom the union had a primary dispute. Accordingly, the court entered a decree enforcing the Board's order, which enjoined the union from engaging in such picketing in the future with respect to these and any other neutral

employers. The question presented in the instant contempt proceeding is whether the court of appeals properly found that the union thereafter engaged in the same type of secondary picketing against other neutral employers, in violation of the court's decree.

STATEMENT

A. The Unfair Labor Practice Proceeding

The facts underlying the decree entered by the court of appeals in the prior enforcement proceeding are set forth in the unfair labor practice decision of the Board and the opinion of the court in that proceeding (151 NLRB 341; App., *infra*, pp. 14-20). They may be summarized as follows:

University Cleaning Company, with its office and warehouse located in Cambridge, Massachusetts, furnishes cleaning and other janitorial services to various customers in the Boston area. University recognized petitioner Union [2] as the representative of its employees in 1957, and thereafter entered into a series of collective bargaining agreements with the Union, the last of which expired on May 30, 1962. The parties met on numerous occasions to discuss a new agreement, but without success, and negotiations were broken off in December 1962. In March 1963, the Union entered into a collective bargaining agreement with a newly formed association of cleaners. Short'y thereafter, the Union requested University,

[2] Local 254, Building Service Employees International Union, AFL-CIO.

which was not a member of the association, to resume negotiations. University refused and withdrew recognition from the Union, because it believed that the Union no longer represented a majority of its employees.

United Airlines used University's cleaning services at its three Boston ticket offices. University's employees performed their work after the close of each of United's business days. The Great Atlantic and Pacific Tea Company (A&P) also used University's services at its Massachusetts Avenue retail store. One morning a week, during the store's operating hours, University employees washed the windows, and once every three weeks, after closing hours, they cleaned the store. In late March and early April 1963, Union representatives told various officials of United that University was nonunion, and was undermining the industry wage rates, committing unfair labor practices, and destroying the Union's public image. The Union suggested that United hire a unionized cleaning firm, and, when United indicated its satisfaction with University, the Union asserted that United would not like to have pickets in front of its ticket offices. Similarly, the Union informed A & P of the Union's grievances against University. When A & P asked what this had to do with it, the Union asserted that some of A & P's stores might be involved in picketing.

On April 22, 1963, the Union commenced picketing in front of A & P's Massachusetts Avenue store, and two days later picketing began at two of United's

ticket offices. Two pickets appeared at each location carrying signs which read: "The contract cleaners employed here are not members of Local 254 AFL-CIO." They walked back and forth in front of customer entrances for about two weeks, only on business days and during business hours. University employees were not present at any of the locations during the picketing, except for one half-hour period when they washed the windows of the A & P store. The pickets did not distribute any literature or engage anyone in conversation.

Upon the foregoing facts, the Board found that the Union, by its threats to picket, and its actual picketing of, United and A & P, had threatened, coerced, and restrained those neutral employers, with an object of forcing or requiring them to cease doing business with University. Accordingly, the Board held that the Union had violated Section 8(b)(4)(ii)(B) of the Act (R. 18).[3] The Board's order required the Union to "[c]ease and desist from threatening, coercing, or restraining United Airlines, The Great Atlantic & Pacific Tea Co., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require them to cease doing business with Herbert Kletjian, d/b/a University Cleaning Co." (R. 19).

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[3] The Board dismissed the allegation of the complaint that the Union had also violated Section 8(b)(4)(i)(B) of the Act, by inducing or encouraging individuals employed by United, A & P, and other persons to strike or refuse in the course of their employment to handle or work upon goods or perform services (R. 18).

On April 15, 1966, the court of appeals sustained the Board's findings and entered a decree enforcing the Board's order (R. 123-129; App., *infra*, pp. 14-20).

B. The Contempt Proceeding

University's cleaning services were also used by the Craftsman Life Insurance Company, at its Boston office, and by the Lewis Shepard Products Company, at its manufacturing plant in Watertown, Massachusetts (Pet. App. 12; R. 218-219, 221-222, 226, 231-232).[4] The Union commenced picketing of both companies in late August 1966, after the court of appeals had entered its decree enforcing the Board's cease-and-desist order. Two Union representatives walked back and forth in front of the entrances to the Craftsman office and Lewis Shepard plant, wearing signs and distributing leaflets which read:

Unfair

University Cleaning Company
is an unfair cleaner.
University Cleaning Company
does not meet the union
standards.
Lewis Shepard Products Inc. Watertown,
American Electroplating Co., Harding
Gross, Inc., Seal-Rite of Cambridge
and Craftsman Insurance, Boston
are using the services of this
unfair cleaner.

[4] The facts in the contempt proceeding were developed at an evidentiary hearing held before the court of appeals. The transcript of testimony is included in the certified record filed with the petition.

> This statement is directed to customers and the public only. It is not a request to employees to refuse to pick up, deliver, or transport or refuse to perform any services.
> B.S.E.I.U. Local 254 AFL-CIO

(Pet. App. 13-15; R. 219-220, 225, 227-231, 234-237, 241-242, 254-255, 300-301, 303-304, 311, 313, 332-333).[5]

This activity continued for several weeks. It was carried on only during the regular business hours of Craftsman and Lewis Shepard, when University employees were not present (Pet. App. 13-14; R. 220-222, 229-232, 242-243). The Union never engaged in such conduct at University's business premises, although it was located on one of the busiest streets in Cambridge (Pet. App. 13; R. 135, 159, 239, 243-244).

Based on these facts, the court of appeals granted the Board's petition to adjudge the Union in civil contempt. The court found that the Union had engaged in "secondary picketing" against Craftsman and Lewis Shepard to force them to cease doing business with University, and that these activities constituted "clear and intentional violations" of the court's prior decree (Pet. App. 13-15).[6] The court ordered

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[5] At times, one Union representative picketed while the other rested (R. 224, 234-235, 241-242, 252-255, 303-304, 311).

[6] The court denied that part of the Board's petition based on the Union's picketing of the Massachusetts Department

the Union to purge itself by reimbursing the Board's expenses in the contempt proceeding (Pet. App. 18-19).[7]

ARGUMENT

The question which petitioner seeks to raise—*i.e.*, whether a union may properly be held to violate the secondary boycott provisions of the Act where it merely *distributes handbills* appealing to the public to support it in its labor dispute with the primary employer—is simply not presented on the facts of this case. The court below found, and the evidence summarized in the Statement (*supra*, pp. 7-8) fully supports its findings, that petitioner's handbill distribution was merely an incident of activity which "unquestionably was picketing" (Pet. App. 13),[8] and

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of Education, to which University had submitted the lowest bid for a cleaning contract. The court noted that "the words 'threaten, coerce, or restrain,' " contained in the prior decree, "have never been defined where the object is a public agency," which "has no customers"; and that the Union's "objective" was not "entirely clear", since "the Department's policy of not requiring contractors to comply with any minimum wage and benefit standards" "might be matters in legitimate, primary dispute between the union and the Department" (Pet. App. 16-17). Accordingly, the court concluded that the Department picketing "raises possibly difficult and substantially different questions from those raised by the conduct that led to the Board's order" (Pet. App. 17).

[7] Expenses attributable to the issue discussed in note 6, *supra*, were excluded (Pet. App. 18).

[8] Thus, the Union representatives not only passed out handbills, but also carried signs back and forth in front of the entrances of Craftsman and Lewis Shepard, during the regular business hours of those companies. Indeed, the Union's

that such activity was intended, not as an informational appeal to University's customers, but rather as a means of exerting pressure on neutral employers Craftsman and Lewis Shepard to have them cease doing business with University (Pet. App. 13-14).[9] Accordingly, the only question presented is whether the court below properly concluded that such *picketing* constituted restraint and coercion for a secondary object, within the ban of Section 8(b)(4)(ii)(B) of the Act and the court's prior decree.[10]

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principal witness admitted on cross-examination that he visited the premises of these companies "most every day," and observed one Union representative "patrolling up and down" (R. 311). This is "the traditional form of ambulatory patrolling by union members carrying placards in front of the plant," which characterizes picketing. *National Labor Relations Board* v. *United Furniture Workers*, 337 F. 2d 936, 937 (C.A. 2). See also *National Labor Relations Board* v. *Local 182, Teamsters*, 314 F. 2d 53, 57-58 (C.A. 2).

[9] In the course of its opinion, the court below referred to petitioner's contention "that its conduct was not directed against Craftsman and Lewis Shepard, but was intended to inform potential customers of University that it was non-union" as "a transparent afterthought" (Pet. App. 13). Except for one isolated incident in the past (Pet. App. 13, n. 1; R. 245, 319), there is no evidence that University's prospective customers ever came to the premises of its present customers to inspect the cleaning services performed by University (Pet. App. 13; R. 222-223, 232-233, 245-246); indeed, the Union official who arranged for the picketing admitted that he had no knowledge that prospective customers had ever done so (R. 300-301, 319). Moreover, the picketing was never carried on at University's own premises, nor at times when University employees were on the premises of Craftsman or Lewis Shepard (*supra*, pp. 7-8).

[10] Quite properly, the court below rejected as immaterial the fact that Craftsman and Lewis Shepard had not been noti-

In our view, the court below was clearly correct in concluding that petitioner's picketing violated Section 8(b)(4)(ii)(B) and its prior decree. The activity was virtually identical to the picketing which the court enjoined in the original enforcement proceeding (see *supra*, pp. 5-6),[11] and the Union's objective was the secondary one of putting pressure on neutral employers Craftsman and Lewis Shepard, in order to compel them to cease doing business with University. Moreover, the terms "threaten, coerce, or restrain," as used in subparagraph (ii) of Section 8(b)(4), were intended to encompass secondary picketing of the type involved here, notwithstanding that it was peaceful and appealed to the general public.[12]

Nor does *National Labor Relations Board* v. *Fruit and Vegetable Packers, Local 760*, 377 U.S. 58, require a contrary conclusion. There the union, in furtherance of its dispute with certain fruit packers, picketed retail stores with signs requesting customers

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fied in advance that University was nonunion, or that the Union intended to picket (see Pet. App. 13).

[11] *National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46, *Great Western Broadcasting Corp.* v. *National Labor Relations Board*, 356 F. 2d 434, (C.A. 9), certiorari denied, 384 U.S. 1002, and *Cedar Crest Hats, Inc.* v. *United Hatters Union*, 362 F. 2d 322 (C.A. 5), cited by petitioner (Pet. 5, 6, 7), are thus wholly inapposite, since those cases did not involve picketing, but only leafleting and other publicity protected by the proviso to Section 8(b)(4)(ii)(B).

[12] See, on this point, the legislative history detailed in *National Labor Relations Board* v. *Fruit and Vegetable Packers, Local 760*, 377 U.S. 58, 65-71.

not to purchase apples supplied by those packers. The Court found such picketing to be lawful because, since it was "employed only to persuade customers not to buy the struck product," the union's appeal was "closely confined to the primary dispute" (377 U.S. at 72). However, the Court distinguished the situation where "consumer picketing is employed to persuade customers not to trade at all with the secondary employer," holding that, in that event, "the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer" (*ibid.*).[18] That is precisely the situation involved here. Neither Craftsman nor Lewis Shepard sold to their customers any product or service supplied by University; therefore, the Union, insofar as it appealed to the customers of Craftsman and Lewis Shepard, necessarily called for them to boycott the entire business of those neutral employers. *Fruit and Vegetable Packers* recognizes that secondary consumer picketing with such an impact on neutral employers is within the ban of Section 8(b)(4)(ii)(B). See also *National Labor Relations Board* v. *Building Service Employees, Local 105*, 367 F. 2d 227, 229-230 (C.A. 10).

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[18] Finding the rationale of *Fruit and Vegetable Packers* inapposite, the court of appeals characterized that case as holding only "that peaceful secondary picketing of retail stores aimed *solely* at persuading customers not to buy a particular product, is not a violation of Section 8(b)(4)" (App., *infra*, p. 19).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1967.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6626.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

LOCAL 254, BUILDING SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,
RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before ALDERICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

OPINION OF THE COURT.
April 15, 1966.

MCENTEE, *Circuit Judge*. This is a petition to enforce an order of the National Labor Relations Board based on a finding that the respondent union [1] violated Section 8(b)(4)(ii)(B) of the Act [2] by

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[1] Local 254, Building Service Employees International Union, AFL-CIO.

[2] Section 8(b)(4)(ii)(B) makes it an unfair labor practice for the union—

(ii) to threaten, coerce, or restrain any person engaged

threatening to picket and by picketing United Airlines (United) and the Great Atlantic & Pacific Tea Company (A & P), with an object of forcing or requiring them to cease doing business with University Cleaning Company (University).

The Board's findings are made on the following evidence. University is in the business of furnishing cleaning and janitorial services to various customers in the Boston area. Its place of business is in Cambridge, but no work is performed there. In some instances employees report to Cambridge, but usually only to pick up the company truck and necessary tools and equipment. Since most of its work is performed after the regular business hours of its customers, a majority of the employees report directly to the customer's place of business.

Over the years from 1957 to 1962 the Union and University had collective bargaining agreements of one type or another but they parted company late in 1962 after negotiations for a new agreement had failed. Subsequent attempts by the Union to get

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in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

together with the company on another agreement also failed. United and A & P were two of University's customers. University performed cleaning services for United at its three Boston offices. During March and April 1963 officials of the Union made a total of six visits to United's offices to protest its employment of University. During the course of these visits one or the other of the two Union officials involved made certain statements to management personnel with regard to picketing United.[4]

On April 23 one of the Union officials informed United by telephone that there would be picket lines at its offices the next day. On April 24 pickets appeared at United's Statler-Hilton and Federal Street offices. They walked back and forth in front of the entrances carrying signs which read: "The contract

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[4] The Chief of Ticket Sales for United's three Boston offices testified that on April 17th during a conversation at the Statler-Hilton office, Kofman, a union organizer, indicated to him ". . . that he didn't think I would like to see pickets outside our ticket office." The assistant sales manager for United in Boston testified that on the same day at the Stuart Street office, Kofman "told me that the local now had the authority to strike . . . picket our premises" and when asked when such picketing might start, Kofman replied that he didn't know but "It could be the following day, or a week hence. . . ." He further testified that at a meeting the following day at the Stuart Street office at which United's district sales manager and the two union officials were also present, the district sales manager asked Buffum (the other union officials) " 'What would you like us to do.' " Buffum suggested that United hire a cleaner who was a union employee. After being told that United was satisfied with Universitys' services and that the quarrel was with the cleaner and not with United, Buffum ". . . again pointed out that we would have pickets in front of our places of business and that perhaps we wouldn't like that and we agreed that we wouldn't."

cleaners employed here are not members of Local 254 AFL-CIO." No literature was passed out nor did the pickets engage any one in conversation. They remained at their stations from about 9 a.m. to 4:30 p.m. for a period of two weeks.

The Union contacted the management of A & P only once—by telephone. The conversation was similar to those with United.[5] On April 22 two pickets appeared at A & P's Massachusetts Avenue store. They walked back and forth in front of the customer's entrance carrying signs identical with those used at United. As in the picketing at United, no literature was passed out and the pickets did not engage anyone in conversation. The pickets patroled the store entrance from 9 a.m. to 4:30 p.m. for about a week. On these facts the Board found that the Union violated § 8(b)(4)(ii)(B) of the Act.

This court's function under the Act is merely to determine whether on the record taken as a whole there is substantial evidence to support the Board's findings. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951); *N.L.R.B.* v. *Lipman Brothers, Inc.*, 355 F.2d 15, 20 (1st Cir. 1966). In *N.L.R.B.* v. *United Ass'n of Journey. & App. of Plumbing, Etc.*, 320 F.2d 250, 253 (1st Cir. 1963), speaking of Section 8(b)(4)(ii)(B), we said: "The section seeks to avoid the implication of employers in disputes not

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[5] A & P's divisional purchasing agent who received the call reported the conversation as follows: "He said they had just heard from the union headquarters . . . that they had permission to picket University Cleaning and I said, 'So what has that got to do with me?' Well, he said that it might involve the picketing of some of our stores. So I said, 'Do you have a right to picket our stores, you have no fight with us?' He said, 'We have permission to, I didn't say we were going to, but we have permission to do it.'"

their own where an object of the union conduct is to force the cessation of business relations between such neutral employers and any other person." As the court said in *International Brotherhood* v. *N.L.R.B.*, 181 F.2d 34, 37 (2d Cir. 1950): "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands."

In the instant case it is clear that the respondent Union sought to involve both United and A & P in its dispute with University. Obviously the pre-picketing conversations with United and A & P were intended to force or require these two neutral companies to cease doing business with University. The Union's real objective was made clear at the last meeting with United. When asked what the Union would like United to do, its reply was to hire a union cleaner. When told that United was satisfied with University, the Union threatened United with picketing. Within a week the Union carried out this threat.

The A & P pre-picketing conversation is no less a violation simply because only one brief conversation was involved. The Union contends, at least by implication, that the content of that conversation does not amount to a threat. We disagree. The language used[6] must be taken in the circumstances surrounding the case. Words harmless in themselves can take on a sinister meaning in the context in which they

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[6] See n. 5.

are used. *Local 901, Internat'l Bro. of Teamsters, Etc.* v. *Compton*, 291 F.2d 793, 797 (1st Cir. 1961). For one thing, there was a labor dispute going on between the Union and University and that alone puts the activities of the Union with reference to University's customers in a different light. The implications of the conversation are clear.

We agree with the Board that there is sufficient evidence to indicate that this one telephone conversation with A & P and the conversations with United referred to above [7] were of a threatening nature with an object of forcing or requiring these companies to cease doing business with University and thus violated § 8(b)(4)(ii)(B) of the Act. *N.L.R.B.* v. *United Ass'n of Journey. & App. of Plumbing, Etc., supra; Burr* v. *N.L.R.B.*, 321 F.2d 612 (5th Cir. 1963).

Now let us consider the picketing itself. The Union claims the picketing here was merely informational in nature; that in picketing United and A & P the Union was merely following the product [8] to the appropriate locations where the public could be alerted to the facts. In support of this contention the Union relies on *N.L.R.B.* v. *Fruit Packers (Tree Fruits)*, 377 U.S. 58 (1964), which held that peaceful secondary picketing of retail stores aimed *solely* at persuading customers not to buy a particular product, is not a violation of Section 8(b)(4). We do not think the rationale of that case is applicable here.

With respect to respondent's argument that it was engaged in lawful "common situs" picketing, we need only mention that the employees of the primary em-

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[7] See n. 4.

[8] The cleaning service.

ployer were never present during the picketing,[9] and the signs carried by the pickets failed to identify the primary employer as the target of the dispute. Thus, the standards set up by the Board in *Sailors' Union of the Pacific (Moore Drydock)*, 92 N.L.R.B. 547, were not met. *N.L.R.B.* v. *Plumbers Union of Nassau County, Local 457, etc.*, 299 F.2d 497, 501 (2d Cir. 1962); *N.L.R.B.* v. *International Hod Carriers, Etc.*, 285 F.2d 397, 400-402 (8th Cir. 1960).

Upon an examination of the entire record we conclude that the Board's findings are supported by substantial evidence.

A decree will be entered enforcing the order of the Board.

[9] With the exception of the window washers who work at A & P during store hours only about one-half hour a week, usually on Tuesday morning.

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